No. 15173

In the
United States Court of Appeals
For the Ninth Circuit

GABRIEL T. MARTINEZ and
THERESA MARTHA MARTINEZ,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appellants' Closing Brief

HAROLD J. ACKERMAN
SAM BUBRICK
322 North Avenue 19
Los Angeles 31, California
Attorneys for Appellant

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Appellants' Closing Brief

Appellants in this closing brief will seek to touch upon the main issues as responded to by appellee in the Appellee's Brief.

A.

SUFFICIENCY OF THE EVIDENCE AGAINST GABRIEL T. MARTINEZ

Appellee urges that the evidence against Appellant Gabriel T. Martinez is sufficient to sustain the convictions. Appellee argues (p. 17) that the jury could properly infer that Gabriel T. Martinez was present at 3040 Atwater Street on February 27, 1956, because there was a great deal of confusion and Martinez had he been there would have had time to run away.

It must be carefully noted that a man did leave the window, shot one of the officers and escaped. But this is not the man appellee has reference to, for this man was seen face to face by the officer and was described as "unknown" and "whose identity is still unknown" (RT 142).

What appellee is arguing is that someone could have (Gabriel T. Martinez) left before this "unknown" man. The officer was asked if he saw Gabriel T. Martinez come out of the house at any time and the officer stated he did not (RT 159). Appellee is using a hypothetical example of possibilities to establish evidence, not facts. There was no evidence and the officers do not even suggest that someone else left before the unknown man. This appellant submits is pure conjecture in a vain attempt to place Gabriel T. Martinez in the house on February 27, 1956.

B.

SUFFICIENCY OF THE EVIDENCE AGAINST THERESA MARTINEZ

Appellee's Brief (p. 22) recites certain evidence from which appellee concludes (p. 23):

> "The evidence is reasonably susceptible to the finding that Theresa had full knowledge of the use of her home as a center of traffic in narcotics. At the very least she must have known of its concealment on the premises which was one of the purposes of this conspiracy."

Appellee recites, in substance, the following facts (Appellee's Brief, p. 22) to support this conclusion:

> "Theresa used the kitchen and utensils for cooking. Heroin was found in an oatmeal box. Theresa has seen the others fooling with a powdery substance. There were capsules, balloons and powder milk sugar in the kitchen. Theresa was inferentially financially benefited by the narcotic traffic."

The weight to be attached to the above evidence is, it is respectfully submitted, not sufficient upon which to sustain a finding of guilty in a criminal charge.

The problem which appellee has to face is this: some incriminatory or connecting facts must be found which would demonstrate that Theresa Martinez was a member of the conspiracy or had knowledge thereof and aided in their transactions and concealment of the narcotics.

The fact Theresa Martinez used the kitchen and did the cooking is not incriminatory. The fact Theresa Martinez had seen others fooling with a powdery substance does not show she participated in their activities. The fact she may have been incidentally a financial beneficiary is not only remote but proves nothing as to her knowledge or participation.

While it is true it is the whole of the evidence and the inferences that may be drawn from this totality upon which the jury are permitted to draw their conclusions the outstanding fact in the evidence is that there is absolutely no showing Theresa Martinez did anything to participate or aid in the conspiracy or charges. She was not shown to know there were narcotics in the house. She was not shown to know of any of the transactions. The only conclusion is that there is a suspicion she may have benefited financially in some indirect way, but as to her having done one single thing to aid or participate the evidence is completely lacking. (Cf. *U. S. vs. Cohen,* 197 F. 2d 26 re appellant Ona Valker on page 29 thereof).

In similar cases the court has typed such evidence "conjecture and suspicion," *Beland vs. U. S.*, 117 F. 2d 958 at 959; "allegedly insinuating circumstances", *Morei vs. U. S.*, 127 F. 2d 827 at 835-6; "colorless evidence", *U. S. vs. Bonanzi,* 94 F. 2d 570 at 572, and "as a strong suspicion", *Quong Mow vs. U. S.*, 13 F. 2d 120.

In *Thomas vs. U. S.*, 57 F. 2d 1039 confronted with facts which showed Simmons was the brother-in-law of Gorges (a conspirator). Simmons was frequently

seen in his company and knew of the conspiratorial arrangement. The court stated (p. 1042):

> "Mere knowledge or approval of or acquiescence in the object and purpose of a conspiracy without agreement to cooperate to accomplish such object or purpose is not enough to constitute one a party to a conspiracy."

C.

KNOWLEDGE AND PARTICIPATION OF THERESA MARTINEZ IN THE CONSPIRACY

To support the conviction of Theresa Martinez, appellee relies (pp. 23-24) upon *Marino vs. United States,* 91 F. 2d 671 at 694 as illustrative of the law and analogous to the facts of this case (Appellee's Brief, pp. 21, 23-24).

Appellants respectfully submit that the *Marino* case, supra, is completely distinguishable. In the *Marino* case one Gullo was present and had openly permitted his ranch to be used to store and recan alcohol. The question before the court was were these established facts sufficient to draw an inference that Gullo knew there was a conspiracy to defraud the government of its tax on alcohol. The court said:

> "But here, Gullo permitted his premises to be used for storage and recanning of alcohol. Such permission aided the purpose of the conspiracy and as we have said the jury could properly infer knowledge."

In the instant case herein there was no necessity for seeking permission from Theresa Martinez to use the premises. She lived there and operated a small business in the business section of Los Angeles. What others did in the house did not necessitate her consent and certainly not her participation. That was their business and as she said:

> "I might do a lot of things, but narcotic's is out of the question." (RT p. 148).

D.

"CONSTRUCTIVE POSSESSION" AS PROOF OF POSSESSION AND THE PRESUMPTION CONTAINED WITHIN SECTION 174 OF TITLE 21, UNITED STATES CONSTITUTION.

Appellee argues (p. 26) that both appellants were in constructive possession of the narcotics and appellee cites *Brown vs. United States,* 222 F. 2d 293 at 297 for the effect that the important element of possession is dominion and not that the possession be immediate or exclusive.

The *Brown* case, supra, involved a defendant whose activity was personally making the necessary arrangements for delivery of narcotics by others. Such facts showed control, though, the defendant never had the narcotics on his person. The case held nothing as to the application of the constructive possession doctrine as it pertains to ownership of premises.

Appellants have searched the cases for any pronouncement that mere ownership of premises suports an inference that all items contained herein are, within the purview of the statute, in "possession" of the owners. The only case found that mentions the words "constructive possession" in a criminal case is *Eng Jung vs. U. S.*, 46 F. 2d 66 at 67. In the *Eng Jung* case the court held narcotics found in the apartment of tenants was not in the constructive possession of the landlord.

It may be that ownership of premises is one item of circumstantial evidence that added to other facts would support an inference of possession of items found therein but here there is little weight to that circumstance because the house was occupied by at least five persons during the period in question.

E.

THE CONSENT OF THERESA MARTINEZ

Appellee argues (pp. 36-38) that the reasoning of the case of *Higgins vs. U. S.*, 209 F. 2d 819 cited by appellants in their opening brief does not apply, because the *Higgins* case said no sane man would consent to a search if narcotics were present *at least in the absence of some extraordinary circumstances.* (Emphasis mine.) *Higgins,* supra, was cited for its reasoning that no consent would logically be given if narcotics were known to be present. Appellee argues that Theresa Martinez might have thought the narcotics were all gone, because one-half ounce was ordered and the combined weight of that found in the house and that delivered was approximately one-half ounce. (Appellants' counsel acknowledges his error in mathematics in adding 174 plus 29 plus 3 to add to 204 (correct 206) Appellants' Opening Brief, pp. 12-15). Appellee then reasons that Theresa Martinez could have believed that one-half ounce was out in the street being delivered and none was left in the house.

This assumes first that Theresa Martinez was home at that time. The officer testified he was watching the house before the delivery by Gavaldon (RT 131, 133, 135) and her automobile was first noticed as he decided to effect an entry (after Gavaldon's departure and arrest) (RT 159-160).

Appellant admits this is not conclusive as defendant Gavaldon testified Theresa Martinez arrived home

about 12:35 (RT 254) and the officers entered about 2:45 (RT 146).

Appellee assumes that Theresa Martinez would know about the order for one-half ounce of narcotics, but would then be unaware of the actual amount delivered because a portion was left behind accidentally or designedly by Gavaldon. Appellant respectfully submits this reasoning is "stretching things a little too far". This reasoning assumes she was home, assumes she knew about the telephone conversation, assumes she knew that Gavaldon had narcotics and assumes she believed there were no other narcotics. All the evidence shows is Theresa Martinez consented to the search because she either didn't know if there were narcotics or she submitted to the continuing implied threat of physical force previously demonstrated.

F.

PLEADING AND PROOF OF OVERT ACT

Appellee argues (pp. 38-39) that the first overt act pleaded was proved except for an immaterial variance. What appellee has not answered is appellants' contention that the overt act pleaded must in some way be in aid of or perpetration of the objects of the conspiracy. The first overt act charged is in substance that Hernandez received money from Howe to purchase narcotics. How this aids or furthers the conspiracy is not shown. Appellee states "We have already discussed the evidence as to the conspiracy and Hernandez's part therein."

The record shows Hernandez pleaded guilty to Counts II and III and was not tried on Count I the conspiracy charge. This proves nothing, but the evidence shows as to Hernandez that he purchased narcotics for himself and Howe and was not a member of the conspiracy to deliver narcotics for the co-conspirators. The question remains unanswered as to how this overt act fits into the conspiracy.

Respectfully submitted,

HAROLD J. ACKERMAN,
SAM BUBRICK,
Attorneys for Appellants.